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April 2, 2003

NOTICE OF EX PARTE PRESENTATION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW B204
Washington, DC 20554

Re: Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33

Dear Ms. Dortch:

The attached written *Ex Parte* Presentation concerning the above-referenced proceeding was sent to Wireline Competition Bureau Chief William Maher, with copies to those identified on the Presentation, by the undersigned on April 2, 2003, on behalf of the United States Telecom Association. In accordance with FCC Rule 1.1206(b)(1), this Notice of *Ex Parte* Presentation and a copy of the referenced *Ex Parte* Presentation are being filed with you electronically for inclusion in the public record. Should you have any questions, please contact me at (202) 326-7300.

Sincerely,

Lawrence E. Sarjeant
Vice President – Law
and General Counsel

Attachment

cc: William Maher
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April 2, 2003 ***EX PARTE PRESENTATION***

William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 Twelfth Street, SW, Room 5 C450
Washington, D.C. 20554

Re: Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33

Dear Mr. Maher:

Since this proceeding was removed from the Sunshine Agenda on February 20th, several *Ex Parte* presentations have been made to which the United States Telecom Association (USTA) hereby responds. These presentations urge the Federal Communications Commission (FCC) to halt its effort to harmonize the regulatory treatment of competing providers of functionally equivalent broadband Internet access service and broadband transport service. The FCC should reject these requests and quickly act in this proceeding to promote ILEC investment in broadband infrastructure and advanced communications services by adopting rules that allow incumbent local exchange carriers (ILECs) the option to provide common carrier broadband transport service, private carrier broadband transport service and broadband transport as the telecommunications component of an information service such as Internet access service.

Some Internet service providers (ISPs) and ILEC competitors have asked the FCC to preserve the regulatory status quo for ILEC broadband services, a status quo that discriminates against ILEC DSL service in favor of cable modem service. Specifically, parties such as EarthLink, The BroadNet Alliance and AT&T argue for the mandatory application of "Computer Inquiry principles"[1] (Title II regulation) to all ILECs that offer DSL service regardless of how it is offered. Having already lost the battle at the FCC to have Title II regulation applied to cable

[1] *See* EarthLink Notice of Oral *Ex Parte* Presentation, CC Docket Nos. 01-337; 02-33, 98-10; 95-20; 01-321, filed March 5, 2003 (EarthLink *Ex Parte*); The BroadNet Alliance *Ex Parte* Communication, CC Docket No. 02-33, filed March 5, 2003 (BroadNet *Ex Parte*); and AT&T *Ex Parte*, CC Docket Nos. 02-33; 01-338; 96-98; 98-147, filed March 17, 2003 (AT&T *Ex Parte*).

companies,[2] EarthLink and BroadNet argue that despite the irrefutable advantage that cable modem service has over DSL service in the mass market,[3] ILEC DSL should be treated exclusively as a Title II common carrier service subject to *Computer Inquiry* safeguards while cable modem transport is treated as a component of an information service and cable modem transport service as private carrier service.[4] On its face, the notion that a non-dominant provider of broadband access to the Internet should be forced to offer its service solely as a regulated common carrier service, while the dominant provider of broadband access to the Internet is allowed to offer its functionally equivalent service as a component of an information service or as private carrier service, is arbitrary and legally unsustainable. Such disparity is also a disincentive for ILEC broadband investment and will delay achieving the national objectives of Section 706 of the Communications Act.[5]

In the *Cable Declaratory Ruling*, the FCC found:

> As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of user's World Wide Web presence, and the DNS. Accordingly, we find that cable modem service, an Internet access service, is an information service. . . . As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.[6]

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[2] "EarthLink asserts that *ComputerII* would require any cable operator providing telephone service to unbundle the underlying transmission capacity of its cable modem service and make it available to other information services providers. We disagree." *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory* Ruling, GN Docket No. 00-185, FCC 02-77 (rel. Mar. 15, 2002) (*Cable Declaratory Ruling*) at ¶ 44.

[3] FCC data indicate that at the end of June 2002 there were 5.1 million asymmetric DSL lines in service and 9.2 million cable modem service customers. Each increased the number of customers using the service by about 30% during the first six months of 2002. *See* FCC NEWS, Federal Communications Commission Releases Data On High-Speed Services for Internet Access, Dec. 17, 2002, at 2. As of June 2002, cable modem service represented 62% of the broadband mass market and DSL service represented 35% of the broadband mass market. The balance was represented by satellite and wireless service providers. *See Behind the High-Speed Slowdown*, Business Week Magazine (September 17, 2002).

[4] "In EarthLink's view the Commission should retain Title II jurisdiction of ILEC-provisioned wholesale DSL and should continue to apply *Computer Inquiry* principles to ensure nondiscriminatory access to such telecommunications services for independent ISPs." EarthLink *Ex Parte* Presentation, March 5, 2003, at 1.

[5] 47 U.S.C. § 706. "The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . "

[6] *Cable Declaratory Ruling* at ¶ 38.

> To the extent that AOL Time Warner is providing a stand-a-lone telecommunications offering to EarthLink or other ISPs, we conclude that the offering would be a private carrier service and not a common carrier service, because the record indicates that AOL Time Warner determines on an individual basis whether to deal with particular ISPs and on what terms to do so.[7]

The FCC has determined that when a cable service provider offers cable modem service to its subscribers in conjunction with its affiliated ISP, the cable modem service is an information service. When a cable service provider offers stand-a-lone broadband telecommunications to non-affiliated ISPs, it is, by virtue of it "offering the service on an individual basis," providing private carrier service not common carrier service. USTA submits that the FCC must provide the same regulatory treatment to local exchange carriers (LECs), whether ILEC or competitive LEC, that choose to offer DSL or other broadband transport in a similar manner. The FCC has proposed such a comparable regulatory framework in this proceeding.[8] It is this proposed regulatory framework that EarthLink, BroadNet and AT&T seek to undermine. The FCC should not allow itself to be diverted from rationalizing its treatment of broadband, regardless of the type of platform used to offer broadband or the historic regulatory status of the entity providing broadband. The FCC should make its judgments based on the characteristics and functionality of the services received by customers and the manner in which the services are offered by the respective broadband service providers. By adopting this approach, the FCC will provide ILECs with the flexibility required to meet the needs of their customers, in a competitively neutral manner, with Title II broadband transport services, private carrier broadband transport services and information services.

USTA opposes continued discrimination in the regulatory treatment of ILEC broadband providers who are offering functionally equivalent services to the same consumer market as cable modem service providers. Customers are choosing between DSL and cable modem for broadband access to the Internet based on service quality and price. Neither service is ubiquitously available, but both continue to expand their reach. The elimination of regulatory rules that are a disincentive for and constraint on ILEC broadband investment will promote greater broadband deployment and increase consumer choice.[9]

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[7] *Id*. at ¶ 54.

[8] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 02-33; 95-20; 98-10, FCC 02-42, Notice of Proposed Rulemaking (rel. Feb. 15, 2002) (*Wireline Broadband NPRM*).

[9] These disincentives include unbundled network element pricing and provisioning requirements that substantially limit the revenues available to nonrural ILECs for broadband investment.

Contrary to BroadNet's assertion, the FCC's recently adopted *Triennial Review*[10] decision does not render the tentative conclusions in the *Wireline Broadband NPRM* moot or superfluous.[11] Until the *Triennial Review* decision is released, the breadth and immediacy of the relief granted to ILECs with respect to line sharing and broadband remains speculative. Further, unless the FCC goes beyond the issues identified for consideration in the *Triennial Review* notice of proposed rulemaking, the regulatory framework for broadband access to the Internet over wireline facilities will not be addressed in the *Triennial Review* decision to the extent proposed in the *Wireline Broadband NPRM*. BroadNet's assertion is simply an unpersuasive attempt to forestall FCC action to rationalize broadband regulation based on the nature of the service and how it is offered rather than the historical regulatory classification of the service provider. Neither BroadNet nor any other party to this proceeding has presented a convincing argument for delaying FCC action here.

Equally unpersuasive is AT&T's argument that ILECs should be required to provide broadband solely under Title II regulation because the FCC has elected to not require cable companies to offer their broadband transport facilities on a common carrier basis.[12] Presuming that the FCC's *Cable Declaratory Ruling* will be upheld on appeal,[13] one must proceed on the basis that the FCC's analysis concerning the distinctions between common carrier services, private carrier services and information services constitutes a correct application of the Communications Act.[14] The same analysis must be applied in determining the appropriate regulatory treatment for wireline providers of broadband access to the Internet. Inconsistency in the analysis and outcome would raise serious constitutional issues concerning the infringement of ILEC equal protection rights. Further, it would be arbitrary and perverse for the FCC to deem ILEC DSL to be a common carrier service solely because the FCC has elected to shield cable modem providers from having to offer equal access to unaffiliated ISPs.

As the FCC concluded in the *Cable Declaratory Ruling*, the functions made available to a broadband service provider's customers determine whether the broadband offering is properly characterized as a common carrier service, a private carrier service or as an element of an information service.

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[10] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338; 96-98; 98-147, Notice of Proposed Rulemaking (rel. Dec. 20, 2001) (*Triennial Review*).
[11] BroadNet *Ex Parte* at 1.
[12] AT&T *Ex Parte* at Attachment p. 5.
[13] *EarthLink v. FCC*, No. 02-1097 (9th Cir. Pending).
[14] 47 U.S.C. 151 *et seq.*

> None of the foregoing statutory definitions [telecommunications service, telecommunications, information service] rests on the particular types of facilities used. Rather, each rests on the function that is made available. Accordingly, we examine below the functions that cable modem service makes available to its end users.[15]
>
> We find that cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing. information provision, and computer interactivity, enabling end users to run a variety of applications. . . . Accordingly, we find that cable modem service, an Internet access service, is an information service.[16]
>
> EarthLink invites us, in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required.[17]
>
> To the extent that AOL Time Warner is making an offering of pure telecommunications to ISPs, it is dealing with each ISP on an individualized basis and is not offering any transmission service indiscriminately to all ISPs. Thus, such an offering would be private carrier service, not a "telecommunications service." Similarly, to the extent that other cable providers elect to provide pure telecommunications to selected clients with whom they deal on an individualized basis, we would expect their offerings to be private carrier service.[18]

As in the case of cable modem service, the regulatory classification of ILEC broadband offerings must be determined by the functions made available to ILEC customers. There is no basis in law that would support applying a different standard for the classification of ILEC broadband offerings.

ILECs must be afforded the same opportunity as cable service providers to structure their broadband offerings in ways that meet customer needs. Further, while cable modem providers have elected to limit cable modem offerings to private carrier services and information services, some ILECs wish to continue to provide DSL service as a common carrier service – a service that is made available to all customers in a service area on an indiscriminate basis. USTA

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[15] *Cable Declaratory Ruling* at ¶ 35.
[16] *Id*. at ¶ 38.
[17] *Id*. at ¶ 43.
[18] *Id*. at ¶ 55.

believes that this is consistent with existing law, follows naturally from the FCC's legal analysis in the *Cable Declaratory Ruling*, and serves the public interest. Rural carriers, in particular, want to preserve their ability to offer broadband Internet transport as a tariffed common carrier transport service both in and outside of the NECA pool.[19] USTA believes that it is imperative to preserve the right of any ILEC to offer broadband internet transport service as a common carrier service just as it does today.

Citing to the *NARUC II Decision*,[20] the FCC stated in the *Cable Declaratory Ruling* that "the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently."[21] This hallmark characteristic of common carrier service was thoroughly discussed in the *NARUC I Decision*[22] and has been consistently followed since. In its *InterSpan Frame Relay Decision*,[23] the FCC noted that "common carrier status attaches to carriers undertaking to provide a service indifferently to all potential customers. In contrast, private carriage is characterized by a carrier choosing its clients on an individual basis and determining in each particular case whether and on what terms to serve."[24] How a carrier offers a service dictates whether the service is a common carrier service. If it offers the service in a manner showing an indifference to whom in the public may take the service, the service is a common carrier service. If its practice is to make individualized decisions as to whom it will provide the service, the service is private carrier service. It is noteworthy that "[t]he cases make it clear both that common carriers need not serve the whole public, and that private carriers may serve a significant clientele, apart from the carrier himself."[25] Ultimately, it is whether the carrier holds itself out to the public indiscriminately that is determinative in appropriately classifying the service as common carriage or private carriage.

Under existing law, carriers have the ability to offer services on a common carrier or private carrier basis. In its *Cable Declaratory Ruling*, the FCC concluded that cable modem service providers may offer broadband telecommunications as a component of a single integrated Internet access service (an information service). Accordingly, the FCC should conclude in this

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[19] If the option to offer broadband services through the NECA tariff or a carrier's own tariff is denied, broadband deployment in rural America will recede and rural customers will suffer. DSL and other broadband services are key economic and growth drivers for rural service areas. The substantial DSL deployment in most areas served by rural telephone companies today can be credited to their ability to offer DSL through NECA or individual company tariffs. In order to ensure continued broadband investment in rural areas, rural telephone companies must retain the ability to provide broadband service on a Title II common carrier basis under tariff.
[20] *NARUC v.* FCC, 533 F.2d 601 (D.C. Cir. 1976) (*NARUC II Decision*).
[21] *Cable Declaratory Ruling* at ¶ 55.
[22] *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (*NARUC I Decision*).
[23] *Independent Data Communications Manufacturers Association, Inc. v. American Telephone and Telegraph Company*, 10 FCC Rcd 13717, Memorandum Opinion and Order (1995) (*InterSpan Frame Relay Decision*).
[24] *Id*. at 13723-13724.
[25] *NARUC I Decision* at 642.

proceeding, consistent with its own precedent and case law, that ILECs may elect to: 1) offer broadband transport service (e.g. DSL service) on an indiscriminate basis to the public as a common carrier service; 2) offer broadband transport service (e.g. DSL service) on individualized terms and conditions as private carrier service; and 3) offer broadband transport as the telecommunications component of a single integrated Internet access service.

Sincerely,

Lawrence E. Sarjeant
Vice President – Law
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